

THE WHITE HOUSE  
WASHINGTON

September 23, 1987

MEMORANDUM FOR SENATOR BAKER  
KENNETH M. DUBERSTEIN  
FROM: WILLIAM L. BALL, III *WLB*  
Subject: Mail Survey on Judge Bork

Attached is a mail survey from Republican Senate offices on the nomination of Judge Bork. This survey was taken on September 22.

Attachment

cc. Tom Griscom  
A.B. Culvahouse  
Ken Cribb

William Armstrong (R-CO)	60/40 in favor
Christopher Bond (R-MO)	3 to 1 in favor
Rudy Boschwitz (R-MN)	3 to 1 in favor (out of 8300 letters)
John Chafee (R-RI)	4 to 1 against This week more in favor
Thad Cochran (R-MS)	1200-315 in favor
William Cohen (R-ME)	70/30 against This week running close to 50/50
Pete Domenici (R-NM)	50/50
Daniel Evans (R-WA)	3 to 2 in favor
Mark Hatfield (R-OR)	50/50
John Heinz (R-PA)	64-56 in favor
Jesse Helms (R-NC)	3 to 1 in favor
Phil Gramm (R-TX)	3 to 1 in favor
Charles Grassley (R-IA)	2 to 1 in favor
David Karnes (R-NE)	3 to 1 in favor
John McCain (R-AZ)	3 to 2 in favor
Mitch McConnell (R-KY)	3 to 1 in favor
Don Nickles (R-OK)	4 to 1 in favor
William Roth (R-DE)	2 to 1 in favor
Robert Stafford (R-VT)	3 to 1 against
Ted Stevens (R-AK)	50/50
Pete Wilson (R-CA)	6 to 1 against

FYI

Let's Talk

Your Comment

Action

FROM: KEN DUBERSTEIN

FOR: HHB

Date: 9/22

WASHINGTON  
THE WHITE HOUSE

**MEMORANDUM**

**TO:** Will Ball  
**FROM:** Howard S. Liebengood ✓  
**DATE:** September 21, 1987  
**SUBJECT:** Bork Nomination

**DECONCINI** (M-WFH-10)

Generally satisfied with Bork's answers at hearings despite posturing to the contrary. Feels he may have no political alternative (in light of interest group pressure in Arizona) other than to oppose Bork.

**WEICKER** (M-WFH-10)

Undecided but definitely leaning against Bork. Believes Bork has shifted views to secure confirmation and cannot be trusted.

**BENTSEN** (DLCTM-WFH-9)

Truly undecided.

Is upset with Boschwitz for spending a lot of money in Texas for finding an opponent.

D.L. thinks Bentsen will be okay but won't decide until the last moment.

Might be worth a personal visit from HHB down the road.

cc: Ken Duberstein

THE WHITE HOUSE

WASHINGTON

September 8, 1987

MEMORANDUM FOR HOWARD H. BAKER, JR.  
KENNETH M. DUBERSTEIN  
WILLIAM L. BALL, III  
THOMAS C. GRISCOM

FROM: ARTHUR B. CULVAHOUSE, JR. *AB*  
COUNSEL TO THE PRESIDENT

SUBJECT: Bork Confirmation Status Report

Set forth below are my personal (and I suspect largely uninformed and naive) views of the current status of the Bork confirmation process. In addition, I've attempted to articulate the opportunities and problems that presently confront us.

Those opposing the Bork nomination have been effective and are very organized. Accordingly, it is very important that any positive communications effort and plan be held in the strictest confidence, since it is likely to be countered and diminished by an opposing press conference, report, or other counter measure. By way of example, a group of four little-known Los Angeles area criminal law professors held a press conference two hours before the President's meeting on August 28 with Governor Jim Thompson and law enforcement officials and thereby cluttered up our positive stories with their shallow claims that Bob Bork was not good on law and order matters.

1. General Overview

My head tells me that we are holding our own, but my sixth sense is very uneasy. There has been a steady drumbeat of well publicized announcements by opposition groups. Most of these announcements have been accompanied by 50-page "reports" finding that Judge Bork's records or views are particularly antagonistic to that group's point of view and alleging that Judge Bork is not a practitioner of judicial restraint, but rather a result oriented right wing activist. With the exception of the Governor Jim Thompson/law enforcement meeting, our efforts have received little publicity (indeed, the Southern Baptist and American Farm Bureau announcements received very little press and none at all in the Washington Post or the New York Times).

I understand from Time and Newsweek writers that both magazines have taken Senate head counts showing that approximately 45 Senators favor the Bork nomination, roughly 35 oppose the nomination, with the remaining 20 undecided. That count might appear comforting, but yesterday's Washington Post indicated that both Senator Heflin and Senator Shelby were undecided and apparently were hearing uncommon opposition to Bork during their visits back home. (Unfortunately, at least part of that opposition was from Christian groups concerned about a statement in Time some weeks ago that Bork was an agnostic.)

## 2. Opponents' Strategy

Current soundings indicate that Judge Bork will continue to be attacked for an alleged lack of integrity. This attack will focus upon the specifics relating to the Saturday Night Massacre and Judge Bork's 1982 Senate testimony during his confirmation hearings. First reports indicate that some of the participants in key meetings before and after Archibald Cox was fired have slightly different recollections (i) of what advice Bork was given by Richardson and Ruckelshaus and (ii) the extent to which Bork reassured Henry Ruth and Philip Lacavonna that the investigation would continue on an independent basis. In addition, the opponents generally are alleging that Bork really has no judicial philosophy, but rather is a judicial activist who will stretch the law, precedent and the Constitution to favor the majority over the minority, business over everybody else, and the Government over everybody but business.

## 3. Administration Strategy

The past two weeks have evinced a continuing criticism of the White House's characterization of Judge Bork as a mainstream jurist. Senator Biden, the ACLU and other Bork opponents describe our characterizations of Bork as a "mainstream" jurist as intellectually dishonest. Some of Judge Bork's right wing supporters think that it simply is an extremely poor strategy destined to ensure Judge Bork's defeat. The brand-new Newsweek distressingly quotes a senior White House aide as saying that Bork is a "right wing zealot," -- which statement is very unhelpful. The mainstream jurist strategy is our strategy; there is no time for another strategy; and it is true that Judge Bork is a mainstream jurist.

## 4. "Scholarly Research"

As a lawyer, I have been more than dismayed with the quality and integrity of what is loosely labeled "research and analysis" of Judge Bork's record. When the White House Blue Briefing Book (which was prepared by many different lawyers over a very short time frame) is the most thorough, fair, balanced and dignified piece of research produced to date,

then one must assume that very few individuals are truly evaluating Judge Bork's nomination on the record. To date, Judge Bork studies have been released (and widely circulated to the press and to newspaper editorial boards) by the ACLU, the AFL-CIO, the Women's Law Center, two Columbia Law School students (often inaccurately described as the Columbia Law Review study), Ralph Nader's Public Citizens Group and consultants to Senator Biden's Judiciary Committee -- all attacking the Bork nomination. Many of those studies are extremely flawed in terms of their analytical method (by way of example the Columbia student study and the Nader study both exclude unanimous decisions from their analysis). The Biden consultants' study somewhat curiously chooses to attack the White House Briefing Book, rather than concentrate solely upon Judge Bork's jurisprudence.

It is important to note a recurring theme in these challenges to Judge Bork. The vast majority of these studies give very little attention to or otherwise dismiss as "uninformative" Judge Bork's record during the past five years as a United States Court of Appeals Judge. All of these studies give scant or no attention to his four-year record as Solicitor General of the United States. Rather, these studies concentrate upon the provocative statements and comments made by Judge Bork in articles, magazines, speeches and other forums outside of his record as Solicitor General and as a Judge. I think this phenomenon is partly attributable to the circumstance that Judge Bork has been more provocative and controversial in his writings and speeches as an academic; his solid record as a Judge and Solicitor General are not subject to fair attack. By way of example, the Biden consultants' 72-page report gave only three paragraphs attention to Judge Bork's four-year record as Solicitor General.

Saying that, the White House Briefing Book has been overwhelmed by these opponents' studies. More than one reporter has advised me that the only pro-Bork piece they have is the White House Briefing Book and that their desks are literally stacked with opponents' studies.

Two pro-Bork scholarly rebuttals are in process. First, the Department of Justice is preparing a "global" response to all of the anti-Bork studies, which is designed to respond to the allegations in the previous studies, and to fairly present Judge Bork's record in great detail. The DOJ study will focus particularly upon Bork's record as Solicitor General and as a Judge, which we believe to be the best indicator of how Bob Bork would perform as a Supreme Court Justice. Secondly, a group of independent, bipartisan academics, under the coordination of Carla Hills, is preparing a series of reports on specific issues which will be released in installments over the next two weeks. Obviously, it is very

important that these responses receive the broadest possible dissemination and the most creative press attention.

#### 5. Nominee Preparation

Judge Bork already has participated in one large moot court. He spent the past weekend with a smaller group going over the legal record and the Watergate/Saturday Night Massacre chronology. It is anticipated that there will be another large moot court, as well as two smaller moot courts (one with a group of academics and one with Senator Baker and other former high Government officials).

My sense is that Judge Bork will be a very good witness, but I do not think he will be a "spectacular" witness. I do not think that extensive grilling by Senators regarding the intricacies of the weekend of the Saturday Night Massacre will allow him to be "spectacular." I also do not think we should raise expectations in this connection.

#### 6. Pro-Bork Witnesses

We have a witness list, which looks to be quite impressive. Much attention needs to be given to finalizing and organizing that list (e.g., who goes on what panel and in what order) and, to the extent we can, communicating to the witnesses the issues that should be emphasized. In addition, there are some gaps on the former Attorneys General panel and the former ABA Presidents panel that need to be finalized this week.

#### 7. Group Support and Opposition

Rebecca Range and I spoke briefly this week. Some of the groups that have endorsed Judge Bork (e.g., the American Farm Bureau and law enforcement groups) are slowly but surely beginning to follow through. In addition, some business groups are quietly supporting the Bork nomination, and we hope to get more union support and women's support (the Concerned Women for America and a few small unions are supporting Judge Bork). The bad news is that the groups opposing Judge Bork (AFL-CIO, ACLU, NAACP, NAACP Legal Defense Fund, NOW, Women's Defense Fund, etc.) are expert at lobbying the Hill and creating grass roots support. Some of the more conservative groups are generating mail in support of the Bork nomination, but we really need more help with the swing Democratic Senators, at least in my view. I frankly do not have any idea how well Judge Bork is doing in the mail to Senators. Press reports have been very contradictory.

#### 8. Press Situation

I am not competent to discuss the press. Our communications strategy apparently has been focused during August upon the

"back home" press in ten states and not on the national press; and I do not have a good idea of how Judge Bork is faring with the state and local news outlets. We do appear, in my view, to have begun losing ground with the large national newspapers and TV networks, in part because of the paucity of available press events and because Bork supporters simply are not adept at properly packaging their announcements of support. There are probably other reasons.

In talking with Judge Bork, Carla Hills, Lloyd Cutler and others, there seems to be a general consensus that we need to give renewed effort to talking with the editorial boards at the Washington Post, Chicago Tribune, New York Times and other major national newspapers. I also believe that Tom Griscom and our other press people should put together a day-by-day communications plan for the next three weeks that would allow us to best disseminate our positive news.

#### 9. Good Things That Can or Will Happen

Set forth below is a list of positive events that are expected to happen, or we could cause to happen, during the next two weeks.

##### ABA Evaluation

The American Bar Association should announce its recommendation with respect to Judge Bork this week. Our best guess is that Judge Bork will receive a "well-qualified" rating (which is the highest rating for Supreme Court Justices) by a divided vote of the Committee (I would hope that only two or three members would dissent). The fact that the vote was not unanimous is somewhat unusual and could be used to diminish the impact of a positive ABA rating. The other alternative would be for Judge Bork to receive an unanimous "qualified" rating, but that is not desirable.

##### Former ABA Presidents

I understand (but have not verified first hand) that eleven of the fourteen living former ABA Presidents have agreed to publicly endorse Judge Bork. Their announcement could serve as the focus for an event at the White House, but this cannot happen until the ABA Committee report is published.

##### Former Attorneys General

We have tentatively scheduled an event where former Attorneys General meet with the President to endorse Judge Bork. That event, which is very confidential, is tentative because former Attorney General Griffin Bell

is out of the country and cannot be in Washington until September 22. In addition, former Attorney General Katzenbach has not yet agreed to publicly endorse Judge Bork -- Howard Baker is attempting to reach him.

Carla Hills' Group

As stated above, Carla Hills is coordinating a group of outside, independent, bipartisan academics who are preparing reports in response to the opposition groups' analyses. The first installment of that effort (four balanced, scholarly pieces on labor law, First Amendment, women's rights and standing) will be available for distribution this week -- probably Wednesday or Thursday. Carla Hills and I have discussed the likely communications vehicle as a press conference sponsored by Senator Dole on the Hill (Sheila Burke says that this could be arranged). Carla Hills, Dole's staff and I have tentatively agreed that it would be preferable not to style this group as an advisory group to the Senate Republicans in response to Biden's Clark Clifford/Larry Tribe group, but rather as what it is -- a free-standing group of academics who have volunteered their time without pay to prepare scholarly responses to be made available to the entire Senate. We need to come to closure immediately upon how to handle this effort. I should emphasize that the Carla Hills group's analyses are not puff pieces, but are balanced and fair. Their bottom line is pro-Bork.

DOJ Global Response

As also noted above, the Justice Department response to the opposition groups' studies is to be available this week (my staff has not yet seen it). When it is ready for distribution, it should be given the widest possible distribution, both on the Hill and to all press. In addition, perhaps there should be a press conference held by one of our Senate supporters touting this response.

Black Supporters for Bork

The Justice Department advises that a group of Black Americans will be getting together in Washington this week to announce their support for Bork. They will emphasize that future Black advances will come from reductions of Black on Black crime and economic advances, and that Judge Bork's philosophy of judging will contribute to that endeavor. I know very little about this event.

## Law Enforcement Part Two

I believe that we ought to ask Governor Jim Thompson and his law enforcement people to have another event on Capitol Hill during the next two weeks in support of Judge Bork and to have a related press conference. This is our offense and we need to stay on the offense as much as possible.

### Women's Groups

Apparently, a large (over 500,000) group called Concerned Women for America is supporting Judge Bork. I would hope that we could get them more visibility. In addition, Rebecca Range has spoken with Judy Hope about energizing other women supporters of Judge Bork.

### Presidential Op-Ed Piece

I do not know who initiated it, but an op-ed piece to be signed by the President is in preliminary, informal circulation. It needs a lot of work, but could be a powerful piece.

### Other Op-Eds and Articles

There are a fair number of these kicking around, some of which need to be placed and some of which simply need to be finalized. There is also a fair amount of confusion about who is doing what. Some good pieces have never been published for whatever reason. I hope that we can at least stay even with the opposition during the next three weeks on this score. Perhaps we can have some of our Cabinet members write op-ed pieces for selected newspapers.

## 10. Bad Things That Will Happen

I do not know all of the bad things that are likely to happen. The opposition has been both effective and discreet (unlike the White House aide who apparently talked to Newsweek).

We do hear rumors that: (i) an interview will be published today wherein Justice Thurgood Marshall may oppose the Bork nomination; the NAACP Legal Defense Fund will formally oppose the nomination, with the resulting possibility that the Chairman of the Legal Defense Fund, William T. Coleman, Jr., also will publicly oppose Judge Bork; former Assistant Watergate Special Prosecutors will publicly criticize Bork (there certainly will be other Saturday Night Massacre shoes to drop); and the ABA Committee dissenters will go public. Bill Coleman's opposition, if it comes, will be a serious blow. Perhaps more importantly, I think the opposition will focus on the Saturday Night Massacre and integrity issues,

claiming that Judge Bork was not candid or truthful during his 1982 Senate confirmation hearings.

11. Conclusion

In conclusion, there is a lot to be done. We are going to need many man hours from all of the Senior Staff during the next month in order to present this nomination effectively and with the merit that it deserves. I defer to Will Ball, but I think we need to have a selected Senior Staff meeting to discuss the foregoing and related matters.

THE WHITE HOUSE  
WASHINGTON

July 17, 1987

The attached has been revised  
since the last time you saw it.

## BORK NOMINATION

### GENERAL OVERVIEW

- Judge Robert Bork is one of the most qualified individuals ever nominated to the Supreme Court. He is one of the preeminent legal scholars of our time; a practitioner who has argued and won numerous cases before the Supreme Court; and a judge who for five years has been writing opinions that faithfully apply law and precedent to the cases that come before him.
- As Lloyd Cutler, President Carter's Counsel, has recently said: "In my view, Judge Bork is neither an ideologue nor an extreme right-winger, either in his judicial philosophy or in his personal position on current social issues....The essence of [his] judicial philosophy is self-restraint." Mr. Cutler, one of the nation's most distinguished lawyers and a self-described "liberal democrat and...advocate of civil rights before the Supreme Court," compared Judge Bork to Justices Holmes, Brandeis, Frankfurter, Stewart, and Powell, as one of the few jurists who rigorously subordinate their personal views to neutral interpretation of the law.
- As a member of the Court of Appeals, Judge Bork has been solidly in the mainstream of American jurisprudence.
  - Not one of his more than 100 majority opinions has been reversed by the Supreme Court. No appellate judge in the United States has a finer record.
  - In his five years on the bench, during which Judge Bork heard hundreds of cases, he has written only 9 dissents and 7 partial dissents in those cases. This is despite the fact that when he took his seat on the bench, 8 of his 10 colleagues were Democratic appointees, as are 5 of the 10 now.
  - Moreover, the reasoning of several of his dissents was adopted by the U.S. Supreme Court when it reversed opinions with which he had disagreed.

- Judge Bork has compiled a balanced record in all areas of the law, including the First Amendment, civil rights, labor law, and criminal law. Indeed, his views on freedom of the press prompted scathing criticism from his more conservative colleague, Judge Scalia.
- Some have expressed the fear that Judge Bork will seek to "roll back" many existing precedents. There is no basis for this view. As a law professor, he often criticized the reasoning of Supreme Court opinions; that is what law professors do. But as a judge, he has faithfully applied the legal precedents of both the Supreme Court and his own Circuit Court. That is why he is almost always in the majority on the Court of Appeals and why he has never been reversed by the Supreme Court. Judge Bork understands that in the American legal system, which places a premium on the orderly development of the law, the mere fact that one may disagree with a prior decision does not mean that that decision ought to be overruled.
- Judge Bork is the leading proponent of "judicial restraint." He believes, in essence, that judges should set aside the decisions of the democratically-elected branches of government only when there is warrant for doing so in the Constitution itself. He further believes that a judge has no authority to create new rights based upon his own personal philosophical views, but must instead rest his judgment solely on the principles set forth in the Constitution.
- His opinions on the Court of Appeals reflect a consistent application of this form of judicial restraint, and he has upheld and enforced "liberal" laws and agency decisions as often as "conservative" ones. What do his opponents in the Senate have to fear? That he will allow them to set policy for the country, and thereby place the responsibility to make political choices where it belongs?
- The rush to judgment against this nominee by several Senators and outside groups is unseemly and unfair. Though the nomination is supposedly so complex and important that hearings on it cannot be held for months, opponents of the nomination waited only days or, in some cases, hours before attacking it. Given their performance, one of their major complaints is ironic: The nominee is said to lack "an open mind."

- At bottom, this opposition is grounded in nothing more than a fear that Judge Bork will not use his seat on the Court to advance specific policy agendas. Such a politicization of the confirmation process, in which Senators seek to determine how a nominee will vote in the specific cases they care about, detracts from the independence of our judiciary and weakens that central institution of our government.
- Why should this nominee be held to some standard other than the traditional one for evaluating judicial nominees--competence, integrity, and judicial temperament? When Judge Bork has had an opportunity to respond fully to the Senate's questions, we are confident he will demonstrate his overwhelming qualifications to be confirmed as an Associate Justice of the Supreme Court.

#### QUALIFICATIONS

Any of Judge Robert Bork's four positions in private practice, academia, the Executive Branch and the Judiciary would have been the high point of a brilliant career, but he has managed all of them. As The New York Times stated in 1981, "Mr. Bork is a legal scholar of distinction and principle."

- Professor at Yale Law School for 15 years; holder of two endowed chairs; graduate of the University of Chicago Law School, Phi Beta Kappa and managing editor of the Law Review.
- Arguably the nation's foremost authority on antitrust law and constitutional law. Author of dozens of scholarly works, including The Antitrust Paradox, the leading work on antitrust law.
- Experienced practitioner and partner at Kirkland & Ellis.
- Solicitor General of the United States, 1973-77, representing the United States before the Supreme Court in hundreds of cases.
- Unanimously confirmed for the D.C. Circuit in 1982, after receiving the ABA's highest rating--"exceptionally well qualified"--which is given to only a handful of judicial nominees each year.

- No appellate judge in America has had a finer record on the bench: not one of his more than 100 majority opinions has been reversed by the Supreme Court.
- Moreover, the reasoning of several of his dissents was adopted by the Supreme Court when it reversed opinions with which he had disagreed. For example, in Sims v. CIA, Judge Bork criticized a panel opinion which had impermissibly, in his view, narrowed the circumstances under which the identity of confidential intelligence sources could be protected by the government. When the case was appealed, all nine members of the Supreme Court agreed that the panel's definition of "confidential source" was too narrow and voted to reverse.

#### GENERAL JUDICIAL PHILOSOPHY

Judge Bork has spent more than a quarter of a century developing a powerful and cogent philosophy of law.

- His judicial philosophy begins with the simple proposition that judges must apply the Constitution, the statute, or controlling precedent--not their own moral, political, philosophical or economic preferences.
- He believes in neutral, text-based readings of the Constitution, statutes and cases. This has frequently led him to take positions at odds with those favored by political conservatives. For example, he testified before the Senate Subcommittee on Separation of Powers that he believed the Human Life Bill to be unconstitutional; he has opposed conservative efforts to enact legislation depriving the Supreme Court of jurisdiction over issues like abortion and school prayer; and he has publicly criticized conservatives who wish the courts to take an active role in invalidating economic regulation of business and industry.
- He is not a political judge: He has repeatedly criticized politicized, result-oriented jurisprudence of either the right or the left.
- He has repeatedly rebuked academics and commentators who have urged conservative manipulation of the judicial process as a response to liberal judicial activism.

- Judge Bork believes judges are duty-bound to protect vigorously those rights enshrined in the Constitution. He does not adhere to a rigid conception of "original intent" that would require courts to apply the Constitution only to those matters which the Framers specifically foresaw. To the contrary, he has written that it is the "task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know." His opinions applying the First Amendment to modern broadcasting technology and to the changing nature of libel litigation testify to his adherence to this view of the role of the modern judge.
- He believes in abiding by precedent: he testified in 1982 regarding the role of precedent within the Supreme Court:

I think the value of precedent and of certainty and of continuity is so high that I think a judge ought not to overturn prior decisions unless he thinks it is absolutely clear that that prior decision was wrong and perhaps pernicious.

He also has said that even questionable prior precedent ought not be overturned when it has become part of the political fabric of the nation.

- Robert Bork is the best sort of judge for genuine liberals and conservatives. Neither liberals nor conservatives ought to be relying on the only unelected branch of government to advance their policy agendas. Judge Bork believes that there is a presumption favoring democratic decisionmaking, and he has demonstrated deference to liberal and conservative laws and agency decisions alike. Some of the opponents to this nomination show a disturbing mistrust of what the American people would do without an activist court to restrain them.
- As The New York Times said in endorsing his nomination to our most important appellate court in 1981:

Mr. Bork...is a legal scholar of distinction and principle....One may differ heatedly from him on specific issues like abortion, but those are differences of philosophy, not principle. Differences of philosophy are what the 1980 election was about; Robert Bork is, given President Reagan's philosophy, a natural choice for an important judicial vacancy.

## FIRST AMENDMENT

- During his five years on the bench, Judge Bork has been one of the judiciary's most vigorous defenders of First Amendment values.
- He has taken issue with his colleagues, and reversed lower courts, in order to defend aggressively the rights of free speech and a free press. For example:
  - In Ollman v. Evans and Novak, Judge Bork greatly expanded the constitutional protections courts had been according journalists facing libel suits for political commentary. Judge Bork expressed his concern that a recent and dramatic upsurge in high-dollar libel suits threatened to chill and intimidate the American press, and held that those considerations required an expansive view of First Amendment protection against such suits.

Judge Bork justified his decision as completely consistent with "a judicial tradition of a continuing evolution of doctrine to serve the central purpose" of the First Amendment. This reference to "evolution of doctrine" provoked a sharp dissent from Judge Scalia, who criticized the weight Judge Bork gave to "changed social circumstances". Judge Bork's response was unyielding: "It is the task of the judge in this generation to discern how the framer's values, defined in the context of the world they knew, apply to the world we know."

Judge Bork's decision in this case was praised as "extraordinarily thoughtful" in a New York Times column authored by Anthony Lewis. Lewis further described the opinion as "too rich" to be adequately summarized in his column. Libel lawyer Bruce Sanford said, "There hasn't been an opinion more favorable to the press in a decade."

- In McBride v. Merrell Dow and Pharmaceuticals Inc., Judge Bork stressed the responsibility of trial judges in libel proceedings to ensure that a lawsuit not become a "license to harass" and to take steps to "minimize, so far as practicable, the burden a possibly meritless claim is capable of imposing upon free and vigorous journalism." Judge Bork emphasized that even if a libel plaintiff is not ultimately successful, the burden of defending a

libel suit may itself in many cases unconstitutionally constrain a free press. He wrote: "Libel suits, if not carefully handled, can threaten journalistic independence. Even if many actions fail, the risks and high costs of litigation may lead to undesirable forms of self-censorship. We do not mean to suggest by any means that writers and publications should be free to defame at will, but rather that suits--particularly those bordering on the frivolous--should be controlled so as to minimize their adverse impact upon press freedom."

- In Lebron v. Washington Metropolitan Area Transit Authority, Judge Bork reversed a lower court and held that an individual protestor had been unconstitutionally denied the right to display a poster mocking President Reagan in the Washington subway system. Judge Bork characterized the government's action in this case as a "prior restraint" bearing a "presumption of unconstitutionality." Its decision to deny space to the protestor, Judge Bork said, was "an attempt at censorship," and he therefore struck it down.
- Judge Bork would be a powerful ally of First Amendment values on the Supreme Court. His conservative reputation and formidable powers of persuasion would provide critical support to the American tradition of a free press. Indeed, precisely because of that reputation, his championing of First Amendment values would carry special credibility with those who might not otherwise be sympathetic to vigorous defenses of the First Amendment.
- Judge Bork has been criticized for an article he wrote in 1971 suggesting that the First Amendment is principally concerned with protecting political speech. It has been suggested that this might mean that Bork would seek to protect only political speech. But Judge Bork has repeatedly made his position on this issue crystal clear: in a letter published in the ABA Journal in 1984, for example, he said that "I do not think...that First Amendment protection should apply only to speech that is explicitly political. Even in 1971, I stated that my views were tentative....As the result of the responses of scholars to my article, I have long since concluded that many other forms of discourse, such as moral and scientific debate, are central to democratic government and deserve protection." He also testified before Congress to this effect in 1982. He has made unmistakably clear his view that the First Amendment itself, as well as Supreme Court precedent, requires vigorous protection of non-political speech.

## CIVIL RIGHTS

- As Solicitor General of the United States from 1973-1977, Robert Bork argued - and won - some of the most important civil rights cases of the decade. For example, in United Jewish Organizations v. Carey, he persuaded the Court to reject a constitutional challenge by white citizens to a redistricting plan and uphold the explicit use of racial criteria in the drawing of boundary lines in order to vindicate the purposes of the Voting Rights Act.
- As a member for five years of the United States Court of Appeals for the D.C. Circuit, Judge Bork has compiled a balanced and moderate record in the area of civil rights.
- He has often voted to vindicate the rights of civil rights plaintiffs, frequently reversing lower courts in order to do so. For example:
  - In Palmer v. Shultz, he voted to vacate the district court's grant of summary judgment to the government and hold for a group of female foreign service officers alleging State Department discrimination in assignment and promotion.
  - In Ososky v. Wick, he voted to reverse the district court and hold that the Equal Pay Act applies to the Foreign Service's merit system.
  - In Doe v. Weinberger, he voted to reverse the district court and hold that an individual discharged from the National Security Agency for his homosexuality had been illegally denied a right to a hearing.
  - In County Council of Sumter County, South Carolina v. United States, Judge Bork rejected a South Carolina county's claim that its switch to an "at-large" election system did not require preclearance from the Attorney General under the Voting Rights Act. He later held that the County had failed to prove that its new system had "neither the purpose nor effect of denying or abridging the right of black South Carolinians to vote."
  - In Norris v. District of Columbia, Judge Bork voted to reverse a district court in a jail inmate's Section 1983 suit against four guards who allegedly had assaulted him. Judge Bork rejected the district court's reasoning that absent permanent injuries the case must be dismissed; the lawsuit was thus reinstated.

- In Laffey v. Northwest Airlines, Judge Bork affirmed a lower court decision which found that Northwest Airlines had discriminated against its female employees.
- In Emory v. Secretary of the Navy, Judge Bork reversed a district court's decision to dismiss a claim of racial discrimination against the United States Navy. The District Court had held that the Navy's decisions on promotion were immune from judicial review. In rejecting the district court's theory, Judge Bork held: "Where it is alleged, as it is here, that the armed forces have entrenched upon constitutionally guaranteed rights through the promotion and selection process, the courts are not powerless to act. The military has not been exempted from constitutional provisions that protect the rights of individuals. It is precisely the role of the courts to determine whether those rights have been violated."
- At the same time, however, Judge Bork has rejected claims by civil rights plaintiffs when he has concluded that their arguments were not supported by the law. For example:
  - In Paralyzed Veterans of America v. Civil Aeronautics Board, Judge Bork criticized a panel decision which had held that all the activities of commercial airlines were to be considered federal programs and therefore subject to a statute prohibiting discrimination against the handicapped in federal programs. Judge Bork characterized this position as flatly inconsistent with Supreme Court precedent. On appeal, the Supreme Court adopted Judge Bork's position and reversed the panel in a 6-3 decision authored by Justice Powell.
  - In Vinson v. Taylor, Judge Bork criticized a panel decision in a sexual harassment case, both because of evidentiary rulings with which he disagreed and because the panel had taken the position that employers were automatically liable for an employee's sexual harassment, even if the employer had not known about the incident at issue. The Supreme Court on review adopted positions similar to those of Judge Bork both on the evidentiary issues and on the issue of liability.
  - In Dronenberg v. Zech, Judge Bork rejected a constitutional claim by a cryptographer who was discharged from the Navy because of his

homosexuality. Judge Bork held that the Constitution did not confer a right to engage in homosexual acts, and that the court therefore did not have the authority to set aside the Navy's decision. He wrote: "If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court." The case was never appealed, but last year the Supreme Court adopted this same position in Bowers v. Hardwick--a decision in which Justice Powell concurred.

- In Hohri v. United States, Judge Bork criticized a panel opinion reinstating a claim by Americans of Japanese descent for compensation arising out of their World War II internment. Judge Bork denounced the internment, but pointed out that in his view the Court of Appeals did not have statutory authority to hear the case. He characterized the panel opinion as one in which "compassion displaces law." In a unanimous opinion authored by Justice Powell, the Supreme Court adopted Judge Bork's position and reversed the panel on appeal.
- Judge Bork has never sat on a case involving an affirmative action plan. While a law professor, he wrote an op-ed piece in 1979 for The Wall Street Journal in which he criticized the recently issued Bakke decision. Since then, however, the Supreme Court has issued many other decisions reaffirming the general constitutionality of affirmative action. That principle was not settled law in 1979; it is now, and Judge Bork has never in any way suggested that he believes this line of cases should be overruled.
- In 1963 Bork wrote an article in the New Republic criticizing proposed public accommodations provisions that eventually became part of the Civil Rights Act as undesirable legislative interference with private business behavior.
  - But ten years later, at his confirmation hearings for the position of Solicitor General, Bork acknowledged that his position had been wrong:

I should say that I no longer agree with that article....It seems to me I was on the wrong track altogether. It was my first attempt to write in that field. It seems to me the statute has worked very well and I do not see any problem with the statute, and were that to be proposed today, I would support it.

- The article was not even raised during his unanimous confirmation to the D.C. Circuit ten years later, in 1982.
- His article did not discuss legal issues or the Constitution--it was purely abstract libertarian political philosophy and had no bearing, even at the time, on his legal views of the Civil Rights Act or the Constitution.
- His article itself, like his subsequent career, makes clear his abhorrence of racism: "Of the ugliness of racial discrimination there need be no argument."

#### LABOR

- Judge Bork's approach to labor cases illustrates his deep commitment to principled decisionmaking. His faithful interpretation of the statutes at issue has resulted in a balanced record on labor issues that defies characterization as either "pro-labor" or "pro-management."
- He has often voted to vindicate the rights of labor unions and individual employees both against private employers and the federal government.
  - In an opinion he authored for the court in United Mine Workers of America v. Mine Safety Health Administration, Judge Bork held on behalf of the union that the Mine Safety and Health Administration could not excuse individual mining companies from compliance with a mandatory safety standard, even on an interim basis, without following particular procedures and ensuring that the miners were made as safe or safer by the exemption from compliance.
  - In concurring with an opinion authored by Judge Wright in Amalgamated Clothing and Textile Workers v. National Labor Relations Board, Judge Bork held that despite evidence that the union, at least in a limited manner, might have engaged in coercion in a very close election that the union won, the National Labor Relations Board's decision to certify the union should not be overturned nor a new election ordered.

- In Musey v. Federal Mine Safety and Health Review Commission, Judge Bork ruled that under the Federal Coal Mine and Health and Safety Act the union and its attorneys were entitled to costs and attorney fees for representing union members.
- In Amalgamated Transit Union v. Brock, Judge Bork, writing for the majority, held in favor of the union that the Secretary of Labor had exceeded his statutory authority in certifying in federal assistance applications that "fair and equitable arrangements" had been made to protect the collective bargaining rights of employees before labor and management had actually agreed to a dispute resolution mechanism.
- In National Treasury Employees Union v. Devine, Judge Bork voted to uphold a district court injunction temporarily prohibiting the Office of Personnel Management from implementing, administering, or enforcing new regulations designed to place greater emphasis on individual job performance, while reducing the importance of length of service, in personnel decisions. The union had sought that injunction (and the circuit court upheld it) on the ground that such OPM actions had been blocked by Congress in an appropriations measure.
- Where the statute, legitimate agency regulation, or collective bargaining agreement so dictated, however, he has not hesitated to rule in favor of the government or private employer.
  - In National Treasury Employees Union v. U.S. Merit Systems, Judge Bork held that seasonal government employees laid off in accordance with the conditions of their employment were not entitled to the procedural protections that must be provided to permanent employees against whom the government wishes to take "adverse action."
  - In Prill v. NLRB, Judge Bork dissented from the panel to support the National Labor Relations Board decision that an employee's lone refusal to drive an allegedly unsafe vehicle was not protected by the "concerted activities" section of the National Labor Relations Act. Judge Bork concluded that the Board's definition of "concerted activities," which required that an employee's conduct must be engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself, was compelled by the statute.

- In International Brotherhood of Electrical Workers v. NLRB, Judge Bork wrote an opinion for the court upholding a National Labor Relations Board decision against the union which held that an employer had not committed an unfair labor practice by declining to bargain over its failure to provide its employees with a Christmas bonus. The court found that the company's longstanding practice to provide bonuses had been superseded by a new collective bargaining agreement which represented by its terms that it formed the sole basis of the employer's obligations to its employees and did not specify a Christmas bonus.
- In Dunning v. National Aeronautics and Space Administration, Judge Bork joined Judges Wald and Scalia in denying an employee's petition for review of a Merit Systems Protection Board decision to affirm a 15-day suspension imposed by NASA for insubordination.

#### CRIMINAL LAW

- Judge Bork is a tough but fairminded judge on criminal law issues.
- He has opposed expansive interpretations of procedural rights that would enable apparently culpable individuals to evade justice.
  - In United States v. Mount, for example, he concurred in a panel decision affirming a defendant's conviction for making a false statement in a passport application. He wrote a separate concurrence to emphasize that the court had no power to exclude evidence obtained from a search conducted in England by British police officers, and that even assuming that it did, it would be inappropriate for the court to apply a "shock the conscience" test.
  - In U.S. v. Singleton, he overruled a district court order that had suppressed evidence in a defendant's retrial for robbery which had been deemed reliable in a previous court of appeals review of the first trial.

- On the other hand, however, Judge Bork has not hesitated to overturn convictions when constitutional or evidentiary considerations require such a result.
  - In U.S. v. Brown, Judge Bork joined in a panel decision overturning the convictions of members of the "Black Hebrews" sect, on the ground that the trial court, by erroneously dismissing a certain juror who had questioned the sufficiency of the government's evidence, had violated the defendants' constitutional right to a unanimous jury. Judge Bork's decision to void nearly 400 separate verdicts in what is believed to be the longest and most expensive trial ever held in a D.C. district court highlights his devotion to vindicating the constitutional rights even of criminal defendants.

#### ABORTION

- Judge Bork's personal views on abortion are irrelevant to his responsibility as a judge to decide fairly the cases which come before him, as are his personal views on any subject. This reflects the heart of his judicial philosophy.
- Neither the President nor any other member of the Administration has ever asked Judge Bork for his personal or legal views on abortion.
- In 1981, Judge Bork testified before Congress in opposition to the proposed Human Life Bill, which sought to reverse Roe v. Wade by declaring that human life begins at conception. Judge Bork called the Human Life Bill "unconstitutional".
- Judge Bork has in the past questioned only whether there is a right to abortion in the Constitution.
- This view is shared by some of the most notable, mainstream and respected scholars of constitutional law in America:
  - Harvard Law Professors Archibald Cox and Paul Freund.
  - Stanford Law School Dean John Hart Ely.
  - Columbia Law Professor Henry Monaghan.

- Judge Ruth Bader Ginsburg, one of Judge Bork's most liberal colleagues on the D.C. Circuit, has written that Roe v. Wade "sparked public opposition and academic criticism...because the Court ventured too far in the change it ordered and presented an incomplete justification for its action."
- The legal issue for a judge is whether it should be the court, or the people through their elected representatives, that should decide our policy on abortion.
- If the Supreme Court were to decide that the Constitution does not contain a right to abortion, that would not render abortion illegal. It would simply mean that the issue would be decided in the same way as virtually all other issues of public policy--by the people through their legislatures.
- Indeed, the polls suggest that, if given the chance, the American people are unlikely to vote to restrict abortion. Things have changed since 1973.
- Some have suggested that Judge Bork ought not to be confirmed unless he commits in advance not to vote to overrule Roe v. Wade. No judicial nominee has ever pledged his vote in a case in order to secure confirmation, and it would be the height of irresponsibility to do so. Indeed, any judicial nominee who did so would properly be accused not only of lacking integrity, but of lacking an open mind.

#### WATERGATE

- During the course of the Cox firing, Judge Bork displayed great personal courage and statesmanship. He helped save the Watergate investigation and prevent massive disruption of the Justice Department. As Lloyd Cutler has recently written, "[I]t was inevitable that the President would eventually find someone in the Justice Department to fire Mr. Cox, and, if all three top officers resigned, the department's morals and the pursuit of the Watergate investigation might have been irreparably crippled." Elliott Richardson has confirmed this, as well.
- At first, Bork informed Attorney General Elliott Richardson and Deputy Attorney General William Ruckelshaus that he intended to resign his position.

Richardson and Ruckelshaus persuaded him to stay. As Richardson has recently said, "There was no good reason for him to resign, and some good reason for him not to." Unlike Bork they had made a personal commitment not to discharge Archibald Cox. Richardson and Ruckelshaus felt that it was important for someone of Bork's integrity and stature to stay on the job in order to avoid mass resignations that would have crippled the Justice Department.

- After carrying out the President's instruction to discharge Cox, Bork acted immediately to safeguard the Watergate investigation and its independence. He promptly established a new Special Prosecutor's office, giving it authority to pursue the investigation without interference. He expressly told the Special Prosecutor's office that they had complete independence and that they should subpoena the tapes if they saw fit the very assertion that led to Cox's discharge.
- Judge Bork framed the legal theory under which the indictment of Spiro Agnew was allowed to go forward. Agnew had taken the position that a sitting vice president was immune from criminal indictment, a position which President Nixon initially endorsed. Bork wrote and filed the legal brief arguing the opposite position, i.e. that Agnew was subject to indictment. Agnew resigned shortly thereafter.
- All this is why, in 1981, The New York Times described Judge Bork's decisions during Watergate as "principled."

#### BALANCE ON THE SUPREME COURT

- It is simply wrong to suggest that Judge Bork's appointment would change the balance of the Court. His opinions on the Court of Appeals--of which, as previously noted, not one has been reversed--are thoroughly in the mainstream. His case-by-case approach is the same as Justice Powell's. Sometimes the civil rights plaintiffs win, and sometimes they do not. Sometimes the labor union wins, and sometimes it does not. In every instance, Judge Bork's decisions are based on his reading of the statutes, constitutional provisions, and case law before him. A Justice who brings that approach to the Supreme Court will not alter the present balance in any way.

- Moreover, the unpredictability of Supreme Court appointees is characteristic. Justice Scalia, a more conservative judge than Bork, has been criticized by some conservatives for his unpredictability in his very first term on the Court. Justice O'Connor has also defied expectations, as Professor Lawrence Tribe noted: "Defying the desire of Court watchers to stuff Justices once and for all into pigeonholes of 'right' or 'left,' [her] story...is fairly typical: when one Justice is replaced with another, the impact on the Court is likely to be progressive on some issues, conservative on others."
- There is no historical or constitutional basis for making the Supreme Court as it existed in June 1987 the ideal standard to which all future Courts must be held.
  - No such standard has ever been used by anyone, conservative or liberal, in evaluating nominees to the Court. The Senate has always tried to look to the nominee's individual merits--even when they have disagreed about them.
  - No such standards were used to evaluate FDR's eight nominations to the Court in six years or LBJ's nominees to the Warren Court, even though, as Professor Tribe has written, Justice Black's appointment in 1937 "took a delicately balanced Court...and turned it into a Court willing to give solid support to F.D.R.'s initiatives. So, too, Arthur Goldberg's appointment to the Court in 1962 shifted a tenuous balance on matters of personal liberty toward a consistent libertarianism...."

#### INDEPENDENCE OF THE JUDICIARY

The confirmation process is not, and constitutionally cannot be, a contest between the Executive and the Legislature in which all weapons, including case-specific or political litmus tests, are fair game. It is proper neither for the President nor for Congress to use such litmus tests, and as a result neither the President nor any member of the Administration has asked such questions of Judge Bork. The avoidance of such tests in the nomination process is essential to preserve the independence of the judiciary. It is the constitutional role and independence of the judiciary, not that of Congress or the President, that is at risk. There will be no winners as between the Executive and the Senate in such a contest, but there could be a loser--the Court.

- The constitutional reason for rejecting "balance" litmus tests is clear: If the Senate tried to preserve the narrow balances of the present Court on, e.g., the death penalty or abortion, it would destroy the constitutionally-guaranteed independence of the Supreme Court.
- The Senate would have to interrogate any prospective nominee on his position regarding abortion, the death penalty, and dozens of other cases. To preserve all these competing balances would subject the Senate to paralyzing competing demands.
- This politicization would plague the confirmation process far beyond this Presidency: It would legitimate blatant vote trading whenever cases arouse strong political interests.
- Moreover, it would be as improper for nominees to answer these questions as it would be for the Senate to ask them. To force nominees to trade their votes on future cases in exchange for Senators' votes on confirmation would diminish the prestige of the Court and politicize judicial decisionmaking, allowing legislators to reach into the Court to control the disposition of cases and controversies.
  - Nominees did not testify at all before the appointment of Justice Brandeis in 1916 and did not do so regularly until considerably later. When such testimony became more common, the necessity of insulating the Court from political manipulation gave rise to the universally-recognized privilege against comments on issues or cases likely to come before the Court.
- As Senator Kennedy has said, "Supreme Court nominees...have properly refused to answer question put to them by the Senate which would require the nominee prematurely to state his opinion on a specific case likely to come before him on the bench." And Justice Harlan said during his hearings that for him, as a nominee, to comment on cases or issues that might come before him "would seem to me to constitute the gravest kind of question as to whether I was qualified to sit on that great Court."

THE WHITE HOUSE  
WASHINGTON

July 15, 1987

MEMORANDUM FOR SENATOR BAKER

FROM: William L. Ball, III *B*  
RE: Proposed calls to Senators in support of Judge Bork

I am attaching a list of phone calls I recommend you make in support of Judge Bork. These are Senators from the Democrat side who voted for Rehnquist plus five freshman from southern States.

Talking points are also attached. Message is "hear him out before you decide..."

cc: Ken Duberstein

- As you know, Judge Bork's nomination is now before the Senate Judiciary Committee.
- I know the kind of pressures you're already under from all directions. I myself went and spoke to the NAACP in New York last week.
- Seriously, some of your colleagues have jumped out early to state their opposition to Judge Bork.
- I hope you will be able to support Judge Bork. He is deserving of confirmation.
- But regardless of what your position may ultimately be, I hope you will hear him out -- give him his day in court -- don't rush to judgement. Hearings probably won't begin until after Labor Day.

THE WHITE HOUSE  
WASHINGTON

July 7, 1987

MEMORANDUM FOR SENATOR FAKEK

FROM: William L. Ball, III *W*  
SUBJECT: Bork Nomination

Judge Bork's nomination will be transmitted to the Senate tomorrow, his courtesy calls with Senate leaders and Judiciary Committee members to begin immediately.

We have reviewed Judge Bork's list of prominent individuals who will or should support his nomination. (Attached) A.E. Culvahouse is talking to Lloyd Cutler on the coordination of certain key endorsements from this list. We are looking for a good op-ed piece immediately on certain specific issues.

Your immediate efforts include:

1. Meeting with Senator Specter
2. Phone calls to Senators Grassley and Humphrey
3. Meeting with Senator Dole and leadership and Judiciary Committee Republicans

Counsel's office is preparing a summary of Judge Bork's opinions for ready reference. Our first murder board with the nominee will convene next week.

To reinforce our basic message, we are encouraging Senate floor statements, op-ed pieces, and letters from prominent individuals and key groups. These efforts will focus on the following:

- Answer the "court balance" issue
- Emphasize unique qualifications and record of service
- Explain abortion issue correctly
- History of 1973 post-Watergate events
- First amendment and other major opinions

A.B. and I will coordinate these activities with our press and public liaison offices.

July 7, 1987

To: SENATOR BAKER  
From: Will Ball *W*

I spoke to Senator Packwood this morning. He said he had been misquoted on the matter of the Bork nomination. At a public meeting in Eugene, he stated that his own personal litmus test on Bork would be his opinion as to how Bork would vote on Roe v. Wade. He did not say that he would filibuster, but he merely observed that the nomination would probably get through the Senate unless it were filibustered. He made no statement that he Packwood would participate in a filibuster.

He will see Bork later this week, if possible, and will wait and see what the Judge has to say before making any further comment.

cc: A. B. Culvahouse

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

July 1, 1987

REMARKS BY THE PRESIDENT  
AT NOMINATION OF  
JUDGE ROBERT H. BORK  
AS ASSOCIATE JUSTICE OF THE SUPREME COURT

The Briefing Room

2:30 P.M. EDT

THE PRESIDENT: Well, it's -- let me announce in advance that I am making a brief announcement here and then the Judge and I are going to depart. And I won't say to you, "No questions." I know better than that, having been in here before. There will be no answers.

Q You'll take lots of questions.

THE PRESIDENT: Well, it's with great pleasure and deep respect for his extraordinary abilities, that I today announce my intention to nominate United States Court of Appeals Judge Robert H. Bork, to be an Associate Justice of the Supreme Court.

Judge Bork is recognized as a premier Constitutional authority. His outstanding intellect and unrivaled scholarly credentials are reflected in his thoughtful examination of the broad, fundamental, legal issues of our times. When confirmed by the Senate as an Appellate Judge in 1982, the American Bar Association gave him its highest rating -- "exceptionally well qualified." On the bench, he has been well-prepared, even-handed, and open-minded.

In taking this action today, I'm mindful of the importance of this nomination. The Supreme Court of the United States is the custodian of our Constitution. Justices of the Supreme Court must not only be jurists of the highest competence, they must be attentive to the specific rights guaranteed in our Constitution and the proper role of the courts in our democratic system.

Judge Bork, widely regarded as the most prominent and intellectually powerful advocate of judicial restraint, shares my view that judges' personal preferences and values should not be part of their Constitutional interpretations. The guiding principle of judicial restraint recognizes that under the Constitution, it is the exclusive province of the legislatures to enact laws and the role of the courts to interpret them.

We're fortunate to be able to draw upon such an impressive legal mind; an experienced judge and a man who already has devoted so much of his life to public service. He'll bring credit to the Court and his colleagues, as well as to his country and the Constitution.

Justice Lewis Powell, in announcing his retirement, said the courts should not be hampered by operating at less than full strength. And with this in mind, I urge the Senate to expedite its consideration of Judge Bork so the Court will have nine Justices when its October term begins. And I have every expectation that it will do so.

We are now going to depart.

END

2:34 P.M. EDT

Bush

Spokesmen

I. The following individuals are people (a) whom he feels comfortable about, and (b) who he feels will be willing to endorse the nomination:

Lloyd Cutler

Griffin Bell

Dean Barbara Black (Columbia Law School)

Dean Guido Calabresi (Yale Law School; has already held press conference endorsing nomination; is friendly with Senator Weicker and appeared in a campaign commercial on his behalf in 1982)

Elliot Richardson (has already endorsed on TV)

Dean Geoffrey Stone (University of Chicago Law School; liberal, former law clerk to Justice Marshall; has already been quoted favorably)

William Coleman (headed the ABA Committee evaluating RHB for Court of Appeals)

Rex Lee

Ed Levi

Gerald Gunther (Law Professor, Stanford)

Paul Bator *U of Chicago*

Kenneth Dam *IBM*

Forrest MacDonald

Morris Liebman (Sidley & Austin; wants to organize committees)

Ed Kitch (Professor, UVA Law School; served under RHB at DOJ; is currently writing op-ed piece explaining that the entire Justice Department would have resigned if RHB hadn't stayed)

Henry Monaghan (Professor, Columbia Law School)

Herb Stein

Ben Wattenberg

*Mary Minter  
midu the Miller*

✓Walter Berns

Judge Louis Pollak (liberal federal district court judge in Pennsylvania; former Dean of Yale Law School; may not feel free as a judge to speak out on this)

Jack Fuller (editorial page editor of the Chicago Tribune; former assistant to Ed Levi at DOJ)

Ronald Rotunda (Professor, University of Illinois; writes textbooks on constitutional law)

Harry Wellington (former Dean, Yale Law School) ~~A~~

James Thomas (Assistant Dean, Yale Law School)

James Friedman (President of Princeton <sup>D. Friedman</sup> College)

Walter Blum (Professor, University of Chicago Law School)

Bernard Meltzer (Professor, University of Chicago Law School)

II. The following individuals are people whom RHB would be comfortable to have speaking on his behalf if they support him, but he is not entirely sure what their position will be:

Derek Bok (they have no relationship)

Wade McCree (they are cordial)

Carla Hills (probably would support)

James Neal (no relationship)

John Hart Ely (former Dean of Stanford; out of the country; Monaghan will approach)

Benno Schmidt (President of Yale; probably would support)

Hannah Grey (President, University of Chicago)

A. Bartlett Giamatti

Thomas Kauper (former head of Antitrust Division; now a Professor at Michigan; they do not entirely agree on antitrust, but RHB believes he will be supportive)

Phillip Areeda (Professor, Harvard Law School)

David Currie (Professor, University of Chicago Law School)

Lane Kirkland (RHB has a cordial relationship with him; RHB opinions on labor law are very moderate; AFL-CIO has taken a wait-and-see posture thus far)

<sup>ND</sup> Floyd Abrams (they have a friendly relationship; likes RHB opinions on libel law)

Anthony Lewis (who knows? he wrote a column on one of Bork's libel opinions calling it "extraordinarily thoughtful" and "too rich" to be adequately summarized in a column)

Burke Marshall (Professor, Yale Law School; headed Civil Rights Division at Yale Law School; they are friends, but Burke is close to Senator Kennedy, and may not be able to speak on this given what the Senator has already said)

The people on these lists are either people whose names we suggested or people whom Bork knows personally. There are going to be lots of people he's never met who will be willing to speak on his behalf, or who will sign a supportive letter if one is circulated. We need to identify them.

KEY EVENTS

FRIDAY

-- Justice Powell calls; speaks to Senator Baker

MONDAY

-- 2:45 p.m. President meets with Senator Baker, Attorney General, and Mr. Culvahouse

TUESDAY

-- 9:00 a.m. Senator Baker discusses further with President

-- Afternoon Senator Baker and Attorney General meet with Dole/Thurmond (3:30 p.m.) and Byrd/Biden (5:30 p.m.) at Capitol

WEDNESDAY

-- 10:30 a.m. President meets with Senator Baker, Attorney General, Duberstein, Culvahouse, and Ball

-- 11:30 a.m. Senator Thurmond meets with President and Senator Baker

-- 11:45 a.m. Further discussion in the Oval Office (President, Baker, Duberstein)

-- (?) Senator Baker called Judge Bork

-- 2:00 p.m. Judge Fork meets with the President

-- 2:30 p.m. President makes announcement

# Baker Call Book

- 1) Ask him to N H at 5 p.m.
- 2) John Tunk will then call to make arrangements
- 3) NO press contact

The President

Thurmond

## NOTIFICATION CALLS

### Senator Baker

3

- Byrd ~~talked~~ 224-5586  
Dole ~~218~~ 224-3135  
in flight - Biden 2240120 or 0122

Justice Powell ~~out of town~~ AB talked  
Judge Webster

### Will Ball

Simpson  
Heflin  
DeConcini  
Leahy  
Heinz

Wright  
Michel  
Rodino  
Fish

7-1-87

### Attorney General

→ Hatch ~~x5251~~ talked  
2:15 LW Specter ~~x4254~~  
Humphrey ~~x2841~~ talked  
2:20 LW Grassley ~~x3744~~ talked  
2:22 LW Kennedy ~~x4543e~~ talked

# Baker call Back

- 1) Set him to W H at 2 p.m.
- 2) John Tuck will then call to make arrangements
- 3) NO press contact

The President

Thurmond

2:15

## NOTIFICATION CALLS

Senator Baker

LW

LW

LW

Byrd

Dole

Biden

2:15

2:15

2:15

224-5564

724-3135

2240120 or 0122

Attorney General

Hatch  
Specter  
Humphrey  
Grassley

Will Ball

Simpson  
Heflin  
DeConcini  
Leahy  
Heinz

Wright  
Michel  
Rodino  
Fish

2244691

6391

JIM SASSER  
TENNESSEE

APPROPRIATIONS  
BANKING, HOUSING  
AND URBAN AFFAIRS  
BUDGET  
SMALL BUSINESS  
GOVERNMENTAL AFFAIRS

United States Senate  
WASHINGTON, DC 20510

June 27, 1987

Dear Honorable Ronald Reagan  
President of the United States  
The White House  
1600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20500

Dear Mr. President:

I am writing to urge very strongly that the Supreme Court vacancy created by Justice Lewis Powell's retirement be filled by Senator Howard Baker, Jr.

Mr. President, I believe that Howard Baker's qualifications for the Court are obvious. His vast experience and the high regard in which he is held by both the Congress and the legal community are generally acknowledged. But several other factors make Senator Baker an especially appropriate choice.

First, the Supreme Court needs representation from the southern states. The retirement of Justice Powell, a Virginia native who replaced Justice Hugo Black of Alabama, leaves the court without a southerner.

Second, it is in the national interest to fill the court vacancy quickly, with as little divisive debate as possible. Howard Baker's distinguished career as Majority Leader of the Senate earned him friendship and respect on both sides of the aisle. A Baker nomination would almost certainly present no confirmation problems in the Senate.

Finally, Senator Baker's temperament and attainments are ideally suited to the Court. Few recent Senators have demonstrated greater skill in understanding both sides of an issue, or in arriving at judicious resolutions to particularly complex disputes.

For all of these reasons, I believe that Howard Baker is the best candidate for the Supreme Court, and I believe that my views are shared by a large number of my colleagues in the Senate.

Respectfully yours,

Jim Sasser  
United States Senator

Materials on

JUDGE ROBERT H. BORK

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July 27, 1987





ROBERT H. BORK

Birth:	March 1, 1927	Pittsburgh, Pennsylvania
Legal Residence:	District of Columbia	
Marital Status:	Married	Mary Ellen Bork 3 children
Religion:	Protestant	
Education:	1944	University of Pittsburgh
	1947 - 1948	University of Chicago B.A. degree
	1948 - 1950	University of Chicago
	1952 - 1953	Law School J.D. degree
Bar:	1954	Illinois
Military Service:	1945 - 1946 1950 - 1952	United States Marine Corps
Experience:	1953 - 1954	University of Chicago Law School Law & Economics Project Research Associate
	1954 - 1955	Wilkie, Owen, Farr, Gallagher & Walton Attorney
	1955 - 1962	Kirkland, Ellis, Hodson, Chaffetz & Masters Associate & Member
	1962 - 1973	Yale Law School Associate Professor (1962-1965) Professor (1965-1973)
	1973 - 1977	Solicitor General of the U.S. Department of Justice
	1977 - 1981	Yale Law School Chancellor Kent Prof of Law (77-79) Alexander Bickel Prof of Public Law (79-81)
	1981 - 1982	Kirkland & Ellis Partner
	1982 - present	United States Circuit Judge District of Columbia Circuit
Office:	3rd & Constitution Avenue, N.W. Washington, D.C. 20001 202 535-3425	

## THE JUDICIAL RECORD OF ROBERT BORK

Judge Robert Bork, nominee for Associate Justice of the United States Supreme Court, has been a practicing attorney, a professor of law, the Solicitor General of the United States, and a federal appellate judge. He is among the most eloquent and principled proponents of judicial restraint. This philosophy of the law holds that judges must faithfully interpret the Constitution and statutes. Judges must give full effect to values that may be fairly discovered in the text, language, and history of the Constitution and apply them to modern conditions as a check against government action. But unelected and unaccountable judges should not overturn legitimate policy choices of elected legislators by imposing their own personal preferences. Judge Bork has thus criticized "the fundamental antipathy to democracy" in which the "desire for results appears to be stronger than the respect for legitimacy." Boyer Lecture, American Enterprise Institute.

Judge Bork's legal philosophy follows directly in the mainstream tradition exemplified by jurists such as Frankfurter, Harlan and Black rather than the "activist" trend which resulted in the invalidation of major New Deal legislation in the 1930's and has recently re-emerged in some quarters. As the following sampling of his positions over the years illustrates, Judge Bork has never wavered in his consistent and principled protection of civil rights, civil liberties and other values that can actually be derived from the Constitution and federal law. As he has written:

The sole task of the judge -- and it is a task quite large enough for anyone's wisdom, skill, and virtue -- is to translate the framer's or the legislator's morality into a rule to govern unforeseen circumstances. That abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist.

Boyer Lecture.

### I. Social Issues

ABORTION -- When he was in academic life, Judge Bork criticized the Supreme Court's right-to-privacy decisions as not

sufficiently grounded in the Constitution. He has, nevertheless, opposed what he views as impermissible attempts to overturn these decisions. In 1981, then-Professor Bork testified against a proposed Human Life Bill, which sought to reverse Roe v. Wade by statutory means. Judge Bork stated that, even if one believes that a constitutional opinion of the Supreme Court was incorrect, this bill made an unconstitutional attempt to prescribe a rule of decision for the courts under the Fourteenth Amendment. Testimony before Subcommittee on Separation of Powers on S. 158.

COURT STRIPPING -- Judge Bork has strongly opposed another legislative shortcut for overturning Supreme Court decisions -- stripping the Court of jurisdiction over various constitutional issues such as abortion, school prayer, or school busing. Judge Bork believes such action to be improper because "the Framers did not intend the exceptions clause [in Article III of the Constitution] as that kind of check upon the Court." Testimony before Committee on the Judiciary on Nomination of Robert Bork to District of Columbia Circuit Court of Appeals.

FAMILY PLANNING -- On the bench Judge Bork showed his respect for statutory requirements by agreeing with a decision that the Health and Human Services Department violated the law in its attempt to require federally-funded family planning grantees to notify parents when contraceptives were provided to certain minors. Thus, the Department's so-called "squeal rule" was overturned by the court. Planned Parenthood v. Heckler.

BALANCED BUDGET AMENDMENT -- Despite then-Professor Bork's concern about the problem of limiting federal spending levels, he opposed the idea of a constitutional amendment or a federal constitutional convention for such purposes. He has written that a constitutional amendment could create "nightmare litigation" that would threaten "judicial dominance in the budget process." Judge Bork has also written that "the aversion to a general constitutional convention is surely sound. The continual reexamination of basic principles is a very bad political habit and ought not be encouraged." Wall Street Journal, April 4, 1979.

## II. Civil Rights

SOLICITOR GENERAL -- During his term as Solicitor General of the United States, Judge Bork was responsible for the

Government arguing some of the most far-reaching civil rights cases in the Nation's history. For example, in the area of voting rights, Judge Bork argued successfully before the Supreme Court in landmark cases, occasionally arguing for even more expansive interpretations of the law than handed down by the Court. See, e.g., United Jewish Organizations v. Carey; Virginia v. United States.

RACIAL DISCRIMINATION -- Since being elevated to the District of Columbia Circuit Court of Appeals, Judge Bork has participated in a number of important opinions upholding the rights of minorities. In the extended voting rights litigation in Sumter County v. United States, he joined an opinion refusing to allow a county to implement an at-large election system because the county failed to show that the voting system had "neither the purpose nor effect of denying or abridging the right of black South Carolinians to vote." In another decision, Judge Bork rejected the notion that the military branches are immune from judicial review in cases involving constitutional rights. Racial discrimination in a failure to promote was alleged and the court held that "[i]t is precisely the role of the courts to determine whether those rights have been violated." Emory v. Secretary of Navy.

GENDER DISCRIMINATION -- Judge Bork has joined in several far-reaching decisions that expand the force of laws prohibiting discrimination based on sex. He agreed, for example, that the Foreign Service was subject to the Equal Pay Act, and reversed a district court that had adopted the contrary view. Ososky v. Wick. He joined in holding that female stewardesses may not be paid less than male pursers in jobs that are only nominally different, and that backpay awards under the Equal Pay Act must be determined by figuring a woman's total experience with a firm, including that accrued before that Act was adopted. Laffey v. Northwest Airlines. Most recently, he joined in reversing a district court's dismissal of a class action suit for sex discrimination brought by female employees against the State Department. The court held that the existence of intentional discrimination can sometimes be inferred from statistical evidence alone. Palmer v. Shultz.

HOMOSEXUAL RIGHTS -- The Supreme Court has held that the Constitution does not secure a right to engage in homosexual conduct. Judge Bork had earlier ruled that no such right prevented the military from barring homosexual conduct. He nevertheless joined in an opinion holding that a homosexual

employee was fully entitled to an administrative hearing prior to being discharged by the National Security Agency. In Doe v. Weinberger, the Agency argued that, because the employee had his security clearance terminated on grounds of homosexual conduct, such an administrative hearing was not required. The court's opinion concluded that a hearing was required by law and was not inconsistent with national security interests.

OTHER CIVIL RIGHTS -- Judge Bork also has written or joined a number of other decisions that demonstrate his support for the rights of all persons. For example, in one decision, the court held that the Interstate Commerce Commission erred in granting permission to build a railroad line without considering the railroad's alleged bad faith in dishonoring promises to safeguard Navajo sacred and historic sites. New Mexico Ranchers Association v. ICC. In a prisoner's rights case, Judge Bork joined in reversing the district court and emphatically holding that a prisoner was entitled to a judicial hearing because of a beating by a prison officer. Norris v. District of Columbia. Judge Bork also authored a decision holding that a group of injured Vietnamese orphans could sue an airplane manufacturer in the United States even though the children could have sued in another country as well. Friends for All Children v. Lockheed Aircraft Corp. He also joined in granting relief to a group of public housing tenants when the Federal government failed to protect them against lead paint hazards in Federal housing projects. Ashton v. Pierce.

### III. First Amendment

DEFAMATION -- Judge Bork's decisions in this area reflect a strong concern for the freedom of the media and of citizens to express unpopular views, as well as a heightened sensitivity to real-world problems confronted by journalists in the modern age. Most notable among his cases is his important concurring opinion in Ollman v. Evans. Judge Bork pointed out in this opinion that "in the past few years, a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose self-censorship on the press which can as effectively inhibit debate and criticism as would overt governmental regulation that the First Amendment would most certainly prohibit." He then extended the reach of the First Amendment by concluding that "rhetorical hyperbole" uttered in the course of constitutionally protected debate did not constitute defamation. Over then-Judge Scalia's objection, Judge Bork found the expansion of First Amendment rights justified because "[a] judge who refuses to see [a] new threat

to an established constitutional value, and hence provides a cramped interpretation that robs a provision of its full, fair and reasonable meaning, fails in his judicial duty." In another opinion, Judge Bork expressed concern that even unsuccessful libel suits could affect journalistic independence if the "high cost of litigation led to undesirable forms of self-censorship." McBride v. Merrell Dow and Pharmaceuticals Inc.

BROADCAST MEDIA -- Judge Bork's inclination to apply strong rules against censorship or government control over public debate is also reflected by his decisions dealing with the First Amendment's application to broadcasting. In cases such as Quincy Cable TV v. FCC, he has indicated his view that new forms of broadcast media are entitled to the protections of the First Amendment. Like Ollman, this is a classic illustration of Judge Bork's application of the original meaning of the First Amendment to contemporary circumstances. In Quincy, the court struck down FCC regulations that required cable operators to carry certain programs on the ground that the regulations violated the operators' First Amendment rights.

FREE SPEECH -- Judge Bork wrote an opinion holding that a public transit authority violated the free speech rights of an individual by refusing to allow him to use advertising space within the subways to display a poster critical of President Reagan. Lebron v. WMATA. He found that the poster clearly represented protected speech and that the transit authority's refusal to display it was an impermissible prior restraint of that speech. In balancing the state's interest against an individual's First Amendment rights, Judge Bork wrote, "the thumb of the court [should] be on the speech side of the scales."

#### IV. Economic Policy and Government Regulation

ECONOMIC POLICY -- Despite Judge Bork's strong philosophical commitment to free market economics, reflected in much of his antitrust scholarship, he has argued strenuously that the Constitution cannot fairly be read to include protection of economic rights not clearly contained in the text of that document. In commenting upon the propriety of courts invalidating government regulations under a generalized notion of economic libertarianism, Judge Bork has said, "Viewed from the standpoint of economic philosophy and individual freedom, the idea has many attractions. But viewed from the standpoint

of constitutional structure, the idea works a massive shift away from democracy and toward judicial rule." 23 San Diego Law Review 823, 829. Judge Bork also has written that "judges have no mandate to govern in the name of contractarian or utilitarian or what-have-you philosophy rather than according to the historical Constitution." Boyer Lecture.

REGULATION -- Judge Bork has consistently voted to overturn "pro-free-market" deregulatory initiatives when they ignored statutory requirements. Associated Gas Distributors v. FERC; Global Van Lines v. ICC. In one case, he explicitly stated that a free-market "policy may well be defensible, yet it is not among the objectives specified in the Act," and therefore could not be upheld by the court. Independent U.S. Tankers Owners Committee v. Dole. He has also given full scope to government regulations that promote a variety of non-economic objectives, such as health and safety. In United Mine Workers v. MSHA, Judge Bork authored an opinion holding that the Mine Safety and Health Administration improperly excused a mine operator from complying with mine safety standards that were promulgated to protect miners.

LABOR -- Judge Bork has joined or authored numerous decisions that resulted in important victories for labor unions. In the private sector, these decisions include cases involving arbitration disputes, secondary boycott claims, and private settlements of unfair labor practice charges. See, e.g., Northwest Airlines v. Air Line Pilots Association; United Scenic Artists, Local 829 v. NLRB; Oil, Chemical, and Atomic Workers v. NLRB. In the public sector, they include cases involving employer attempts to withhold information from a union, employer misconduct in collective bargaining negotiations, the duty of fair representation, employer obligations to grant official time to employees who negotiate labor agreements, procedures to ensure adequate labor protective arrangements in mass transit systems that come under public ownership, judicial review of arbitration decisions, and government personnel regulations covering reductions in the labor force. See, e.g., AFGE v. FLRA; FLRA v. Social Security Administration; NTEU v. FLRA; AFGE v. FLRA; Amalgamated Transit Union v. Brock; Devine v. White; NTEU v. Devine.

#### V. Other Judicial Issues

CRIMINAL JUSTICE -- Notwithstanding Judge Bork's strong law enforcement positions in a wide variety of areas, he has never

failed to accord criminal defendants every measure of legal and constitutional right. For example, in United States v. Brown, he joined in overturning the convictions of nine defendants on a number of serious criminal charges. Despite what the court conceded was a case of "apparent strength" against the defendants, it found that their Sixth Amendment right to a unanimous jury had been violated where a juror was dismissed and the record disclosed a "real possibility that [the] juror, for whatever reason was not persuaded that the government had met its evidentiary burden." In Sills v. Bureau of Prisons, Judge Bork joined an opinion upholding the right of prisoners and indigent litigants to careful judicial consideration of their complaints. Judge Bork has also noted the importance of extending the protection of the Fourth Amendment to modern invasions of personal privacy. Ollman v. Evans.

PARTISANSHIP -- Believing that the courts need carefully to respect the separation of powers between the judicial and the legislative branches, Judge Bork forcefully rejected a lawsuit by the Republican Party in the House of Representatives challenging the legality of the Democratic leadership's committee membership decisions. Vander Jagt v. O'Neill. In referring to the "constitutional and prudential limits to the power of an unelected, unrepresentative judiciary in our kind of government," Judge Bork held that such controversy was for the Congress, not the courts, to resolve. In the early 1970's, Judge Bork was appointed a special master and assigned the task of redrawing the election district lines within the State of Connecticut. The plan he devised and recommended was opposed by the Republican Party in the State because, while it set compact and equally populated legislative districts, the result was a diminution in Republican strength.

PRECEDENT -- Judge Bork has followed and respected existing precedent even when he might disagree with the substance of such precedent. He has indicated, for example, that despite his own disagreement with some jurisprudential developments in the area of the commerce clause in recent years, he would not be likely to upset those precedents. Judge Bork has observed in this regard, "there are decisions around which too much has grown up to be uprooted. . . . I think it's really too late in the day to tear up [many longstanding precedents]. Too many statutes and understandings are built around them. To tear them up now would be to create chaos." Baltimore Sun, July 5, 1987.

EXECUTIVE AUTHORITY -- Judge Bork joined in a decision that President Reagan lacked the authority to defer the expenditure

of federal funds for policy reasons when the Congress had appropriated these funds for purposes of local housing and community development projects. City of New Haven v. United States. Judge Bork has also authored or joined a large number of opinions that have overturned executive actions, including some cases of very great significance. See, e.g., Associated Gas Distributors v. FERC; Jersey Central Power & Light Co. v. FERC; Quincy Cable TV v. FCC.

#### Conclusion

In summary, Judge Robert Bork has consistently demonstrated throughout his legal and judicial career that he is committed to the idea of judges confining themselves to interpreting the law rather than advocating their own ideas of wise public policy. Further, in such areas as the First Amendment, privacy, and civil rights, Judge Bork has demonstrated an open mind as his views have evolved and matured over the years, sometimes changing significantly over time as new evidence has been presented to him. While opponents of Judge Bork's nomination are likely to focus on specific decisions with whose results they disagree, the real issue in the current debate is not the result of any particular decision but rather the extent to which judges should respect the decision-making of the elected, representative branches of Government. There can be no serious debate that the Los Angeles Times is correct when it observes, "Bork has proved to be a judge who follows the law and legal precedent -- not his personal preferences -- in arriving at his opinions" (July 2, 1987).